

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

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ROBERT SEEDS and LAURA SEEDS,

Plaintiffs,

v.

No. CIV 00-1341 BB/LFG

RICHARD LUCERO, individually and  
in his official capacity, CITY OF  
ESPANOLA, JOHN LENSSEN,  
individually and in his official capacity,  
ANTHONY VANDERVOSSSEN and  
KATHY VANDERVOSSSEN, and SIX  
UNKNOWN EMPLOYEES OF THE  
CITY OF ESPANOLA,

Defendants.

MEMORANDUM OPINION AND  
ORDER DENYING MOTION TO STRIKE JURY

THIS MATTER is before the Court on the motion of Defendants VanderVossen, and the Court having reviewed the briefs of counsel, finds Tenth Circuit precedent requires Denial of the motion.

Discussion

Plaintiffs filed a First Amended Complaint on September 13, 2000, in state district court. The action was removed to this Court on September 25, 2000. On October 9, 2000, the City Defendants served their Answer to the First Amended

**Complaint. The VanderVossens served their Answer to the First Amended Complaint on October 10, 2000.**

**Plaintiffs' jury demand was not filed until December 21, 2000. The Rule 16 conference was held on January 5, 2001. On January 23, 2001, the Court entered an order assigning the case to a standard track and setting pretrial deadlines. The case was transferred to the undersigned Judge. On February 6, 2001, this case was set for a jury trial commencing on December 3, 2001.**

**Defendants VanderVossen correctly point out that Plaintiffs failed to file their jury demand within the ten days from the last pleading directed to the issue as required by Federal Rule of Civil Procedure 38. However, the rule following, Rule 39, provides that “the court in its discretion upon motion may order a trial by a jury of any or all issues.” Fed. R. Civ. P. 39(b). There is a wide divergence of opinion as to the proper guidelines for a court to exercise its discretion in considering such a motion. 9 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2334 p. 185-6 (1995). The Tenth Circuit is among the courts holding “that a jury trial should be granted in the absence of strong and compelling reasons to the contrary.” *Id.* citing *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965); *see also Green Const. Co. v. Kansas Power & Light Co.*, 1 F.3d 1005 (10th Cir. 1993). These courts have reasoned that it is not in the spirit of the Rules of Civil Procedure to deny a party something as fundamental as a jury trial for failing to follow the technical time requirement of the**

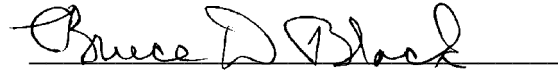
demand procedure. *Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1066 (5th Cir. 1990); *Thompson v. Fritsch*, 172 F.R.D. 269, 270 (E.D. Mich. 1997). “Where the failure to demand was the result of excusable neglect and no prejudice to the opposing party will result, the court, in its discretion, may grant the jury trial.” 33 FED. PROC. L. ED. § 77.127 p. 137 (1995); *Raymond v. IBM Corp.*, 148 F.3d 63, 66-7 (2d Cir. 1998).

In exercising this Court’s discretion, then, the Tenth Circuit presumption is in favor of jury trial and the nonmoving party must show a compelling reason why the belated motion for jury trial should not be granted. *Truesdell v. State Farm Fire & Cas. Co.*, 960 F. Supp. 1511 (N.D. Okla. 1997); *Goff v. Owen Healthcare, Inc.*, 166 F.R.D. 492 (D. Kan. 1996). Defendants VanderVossen make no such showing nor is it likely they could. This case has been scheduled for jury trial ever since it was transferred. All discovery was conducted while the case was on the jury calendar and it would more likely cause prejudice to grant the motion at this late date. Moreover, this is a case which will turn in large measure on motive and credibility, so it is well suited for disposition by a jury. *Tavoulareas v. Piro*, 93 F.R.D. 11, 15 (D.D.C. 1981); *Britt v. Knight Pub. Co.*, 42 F.R.D. 593, 595 (D.S.C. 1967).

### **ORDER**

For the above stated reasons, the Defendants’ motion is Denied.

**Dated at Albuquerque this 29th day of October, 2001.**

  
**BRUCE D. BLACK**  
**United States District Judge**

**Counsel for Plaintiffs:**

**Scott F. Voorhees, Santa Fe, NM**

**Counsel for Defendants VanderVossen:**

**Frank T. Herdman, RUBIN KATZ SALAZAR ALLEY ROUSE & HERDMAN,  
Santa Fe, NM**